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No. 87-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL IRANIAN OIL COMPANY,
Petitioner,

v.

ASHLAND OIL, INC.,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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1. The decision of the court of appeals is neither good for a day only nor limited to its "Iranian" facts and thus, as Ashland asserts, of no broad significance. The opinion below plainly permits any United States company to avoid its contract to arbitrate so long as the arbitration clause sites the arbitration in one of the ninety-one countries which has not signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. §§201 *et seq.*) ("Convention"). Nothing further is required, according to the court of appeals, except a refusal by the United States company for any reason whatever to

arbitrate anywhere. Ordinarily such a refusal to arbitrate in the place agreed to would be considered a waiver by the defaulting party of the right to enforce the forum selection clause and would not affect the more basic promise to arbitrate. Not so here, held the court below, because it was the National Iranian Oil Company's ("NIOC") fault that Ashland would not come to Iran to arbitrate: "[a]s part of the revolutionary Government, NIOC certainly bears responsibility for creating the chain of events making it impossible for an American entity" to arbitrate in Iran (App. 17a).[1]

At the same time the court also found that NIOC could not waive its right to a Tehran arbitration by seeking to compel arbitration in Mississippi: NIOC had "no right to an order compelling arbitration in Tehran" because Iran is not a signatory to the Convention and thus had nothing to "waive" (App. 13a).[2] The result of this approach is to encourage court litigation of claims arising under contracts calling for arbitration in a non-Convention country. Under the decision below, when the American company simply refuses to arbitrate and the foreign company cannot

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[1] It has never been NIOC's position that arbitral proceedings could not fairly be conducted in Iran. NIOC's point is that even accepting Ashland's stated concerns at face value—namely Ashland's assertion that it was impossible for it to engage in an arbitration in Iran—this still did not relieve Ashland of the obligation to arbitrate somewhere.

[2] Ashland's Opposition concedes, however, that an arbitral award rendered and confirmed in Tehran might be enforced against it in the United States. Opp. at 15. Accordingly, NIOC did have rights which it would relinquish if arbitration were ordered in Mississippi.

compel arbitration abroad, the otherwise arbitrable dispute must be litigated.

This analysis applies not just to Iran but to the other 91 nations which have not signed the Convention and with whom United States trade in 1986 exceeded $90 billion.

2. In its Counterstatement of the Case, Ashland details various legal steps that NIOC has been forced to take in order to protect and preserve its claim for $282,881,712.40 for oil sold and delivered to Ashland. These steps include attempts to secure arbitration and filing suit to prevent the running of the statute of limitations in potentially available fora while Ashland refused to arbitrate. Ashland's Counterstatement thus illustrates the very pattern of "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" in the "dicey atmosphere of a legal no-man's land" of transnational litigation. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1976). This Court found avoidance of such difficulty to be a major reason international business transactions so frequently are governed by arbitration clauses.

The Counterstatement confirms that Ashland's stonewalling arbitration is succeeding in forcing litigation in a national court system of a dispute Ashland agreed to arbitrate.[3] Other companies similarly situ-

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[3] NIOC has made clear that if arbitration is ordered it will promptly so advise the Bermuda court which then can be expected to continue the stay which it has ordered of the action pending there against Ashland's Bermuda subsidiary. Consequently, Ashland's suggestion that NIOC prefers litigation to arbitration is erroneous. As the Bermuda court found "NIOC

ated will be likewise encouraged by the decision below to litigate claims in the national court system "hostile to the interests of one of the parties or unfamiliar with the problem." *Id.* at 516. Potentially this strategy affects a significant volume of trade and is not limited to Iran. Ashland's strategy is bound to spawn many imitators.

3. Ashland complains that it is unfair to arbitrate its claim in Mississippi because of some alleged lack of reciprocity. Ashland, however, does not object to litigating in Mississippi and at present can only be found there. By insisting on litigating, but not arbitrating, in Mississippi, Ashland confirms its desire to avoid the neutral, expert decision-makers to whom it agreed to submit its dispute. It further confirms that its opposition to arbitration is not based on any notion of convenience or fairness but rather stems from a desire to do battle on its own turf before an American jury.

In one important respect, however, Ashland will be better off if arbitration is ordered in Mississippi than if its claims are litigated there. Ashland suggests unfairness in that NIOC has no assets in the United States and Ashland will thus be unable to collect an award should it prevail on its counterclaims. This concern applies equally to an arbitral award and a court judgment. An arbitral award in Mississippi will be one rendered in the territory of a signatory to the Convention, and thus enforceable in any Convention country according to the Convention's streamlined procedures. A judgment in favor of Ashland will not enjoy the same ease of enforcement abroad.

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has consistently throughout sought to obtain a private arbitration of its claims in whatever situs might be available ...." App. 54a.

This alone refutes any suggestion of unfairness in NIOC's having sought to compel arbitration in Mississippi where it found Ashland after diligently seeking to obtain arbitration outside Iran and being rebuffed by Ashland.

4. Ashland suggests that the court of appeals' disregard of NIOC's separate legal status was not important to its refusal to apply the Arbitration Act to the dispute below.[4] The contrary is true. Only because the court regarded NIOC as "part of the revolutionary government" (App. 16a-17a) was it therefore chargeable, in the court of appeals' view, with creating the conditions which prompted Ashland's refusal to arbitrate in Iran. Having found NIOC responsible for the conditions of unrest in Iran, the court of appeals then refused to enforce the arbitration promise either positively by compelling arbitration under Section 4 of the Arbitration Act or negatively by staying Ashland's counterclaim under Section 3 of the Act.[5]

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[4] The fact that NIOC is defined as a foreign sovereign by the Foreign Sovereign Immunities Act (28 U.S.C §1603(a),(b)(2)) does not validate the court of appeals' blunderbuss disregard of its separate juridicial status. The same could have been said in *Bancec* where this Court enunciated the presumption of a state instrumentality's separateness. Nor do the definitions of the Algerian Declarations, which identify the types of claims which can be brought at the Iran-United States Claims Tribunal, have any remote bearing on this issue.

[5] Ashland erroneously states that the court of appeals' refusal to stay its counterclaim is not here at issue. Section II of NIOC's Reply Brief in the court of appeals was titled "The Arbitration Agreement May be Enforced under 9 U.S.C. §§3 and 4." Likewise, NIOC's Petition for Rehearing again pressed this point. App. 1a-2a. Finally, the court of appeals devoted several pages of its opinion to the stay issue. App. 7a-10a.

The failure to recognize NIOC's independent juridical status, therefore, was pivotal to the error below. As the United States noted *amicus curiae* in *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("Bancec"), 462 U.S. 611 (1983) the status of governmental trading companies as separate juridical entities is a sensitive matter in our foreign relations. Brief for the United States as Amicus Curiae, Oct. Term 1982, No. 81-984, p. 12 (Pet. 16).

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted. In addition, it may be appropriate for the Court to invite the United States to express its views in this case.

Respectfully submitted,

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